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FAITH, LAW, AND GENDER JUSTICE: RETHINKING DIVORCE LAW IN PAKISTAN

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Abstract

This paper critically examines the law of divorce in Pakistan, particularly the provisions of the Muslim Family Laws Ordinance, 1961, through the dual lens of Islamic conformity and women's welfare. While the law was enacted with the stated aim of protecting women and modernizing family law, it has, in practice, deviated from the injunctions of Islam as mandated by Article 227 of the Constitution of Pakistan. Moreover, instead of safeguarding women's rights, its procedural complexities have often resulted in greater hardship and uncertainty for women in the case of dissolution of marriage by divorce. The paper traces the historical development of the law, evaluates its underlying philosophy, and exposes its inconsistencies with both Islamic jurisprudence and the objectives of social justice. It concludes that aligning the divorce law with Islamic principles would not only ensure constitutional compliance but also provide genuine protection and dignity to women in marital disputes

Keywords: Divorce, Marriage, Pakistan, Gender Justice and Islamic Law

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1. Introduction:

Marriage and divorce are central institutions that shape the moral and social fabric of any community. Under Islamic law, marriage is not merely a social contract; it is also a sacred covenant — a *sacrament*[1] that embodies moral, spiritual, and legal responsibilities between spouses.[2] Because of its dual nature, regulating marriage and divorce is not simply a matter of social policy but one of deep ethical and religious significance. A well-designed legal framework governing these issues reflects a society's values, its understanding of justice, and its commitment to protecting the dignity and welfare of its members.

In Pakistan, where Islam functions both as a moral compass and as a constitutional foundation, the regulation of marriage and divorce assumes even greater importance. Article 227 of the Constitution explicitly requires that all laws conform to the injunctions of Islam as laid down in the Qur'ān and the *Sunnah* of the Holy Prophet (peace be upon him).[3] This obligation is particularly relevant in matters of personal law, which are closely tied to the religious beliefs and moral principles of individuals. Therefore, any law dealing with marriage or divorce must not only remain consistent with Islamic teachings but also ensure fairness and protection for both spouses, especially women, who often face structural disadvantages in marital disputes.

[1] For the details about the question that whether marriage, in Islam, is merely a social contract or is it a sacrament, please see Muhammad Munir, 'Marriage in Islam: A Civil Contract or a Sacrosanct?.' (2008) 31 (1) *Hamdard-Islamicus*

[2] The Qur'ān declares that marriage is a 'firm covenant' between the spouses. Please see 4:21.

[3] In this paper, whenever the name of the Holy Prophet appears, the author intends to offer the salutation of "*Peace and blessing of Allah be upon him*".

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Ideally, the law of divorce should strike a careful balance between religious authenticity and social justice. It should uphold the principles of equity, compassion, and procedural clarity that Islam envisions, while also safeguarding women from unnecessary hardship and legal uncertainty. However, the current law of divorce in Pakistan has struggled to maintain this balance. Instead of aligning itself with the injunctions of Islam or ensuring genuine protection for women, it has produced ambiguities and procedural burdens that often intensify the difficulties faced by women seeking relief.

This paper critically examines Pakistan's law of divorce from two perspectives: first, its inconsistency with the injunctions of Islam as required by Article 227 of the Constitution, and second, its failure to protect and promote the welfare of women within the institution of marriage and beyond.

2. Historical Background of the Law of Divorce

The *Muslim Family Laws Ordinance (MFLO) 1961* represents one of the most significant yet contentious attempts at legal reform in Pakistan's post-independence history. While it sought to modernize family law and improve the legal status of women, it simultaneously provoked strong opposition from religious quarters, particularly for allegedly contravening Islamic injunctions.

The origins of the MFLO lie in a social and political controversy that emerged in 1955 when the then Prime Minister, Muhammad Ali Bogra, contracted a second marriage his Canadian born Lebanese secretary Alia Saddy while still legally married to his first wife, Bagum Hameeda Muhammad Ali. This incident triggered widespread public criticism and

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mobilized women's organizations, most notably the All Pakistan Women's Association (APWA), which began a coordinated campaign demanding reform in family law. Responding to these pressures, the government established a 7 member *Commission on Marriage and Family Laws* (which is also known as Rashid Commission)[4] to examine propose legal reforms in family law to protect the rights of the women. The commission was headed by Khalifa Shuja-ud-Din who died soon after the first meeting of the commission and replaced by former Chief Justice of Pakistan Mian Abdul Rashid. The other members of the commission including the only religious scholar Maulana Ehtisham –ul-Haq Thanawi were Khalifa Abdul Hakim, Mr. Enayat-ur-Rahman, Begum Anwar G. Ahmad, Begum Shahnawaz, Begum Shamsunnehar Mahmood.

The Commission's report, published in 1956, reflected a reformist approach that aimed to regulate the unilateral nature of divorce traditionally vested in men. It proposed that three divorces pronounced in one sitting should be treated as a single revocable divorce, and that for a divorce to become effective, further pronouncements should be made during successive periods of purity (*Ṭuhr)*. It also suggested that no divorce should be valid unless authorized by a matrimonial or family court. These recommendations were intended to ensure procedural fairness and to prevent the arbitrary use of *Ṭalāq*, thereby providing greater protection to women.

However, these proposals were met with intense resistance from the *'ulama*, who regarded them as an infringement upon divine law. Maulana Ehtesham-ul-Haq Thanvi

[4] For the detailed backdrop of the commission and the MFLO, please see Sarah Ansari, 'Polygamy, Purdah and Political Representation: Engendering Citizenship in 1950s Pakistan' (2009) 43(6) *Modern Asian Studies* 1421--1461

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categorically rejected the recommendations, asserting that conditioning the validity of divorce on registration or judicial authorization amounted to interference with Islamic injunctions.[5] Because the severe criticism from the religious fractions,[6] it took 5 years for the incorporation of the some of the recommendations of the commission and MFLO was promulgated in 1961 in which the some of the recommendations of commission were brought into legislation with slight modifications.

The Ordinance contained 13 sections in which the provisions related to succession, registration of marriage, polygamy, divorce, dissolution of marriage otherwise than by Ṭalāq, maintenance, dower were incorporated in section 4, 5, 6, 7, 8, 9 and 10 respectively. The section 7, which deals with the procedure of divorce is the prime focus of this research.

3. The Law of Divorce

The section 7 of the Muslim Family Laws Ordinance, 1961 (MFLO) provides a detailed, yet flawed, procedure for the divorce in Pakistan. The procedure is summarized as follows:

[5] The dissenting note of Maulana Thanawi was written in Urdu and its translated version was part of the report and it was later published in Urdu as well. Please see Maulana Ehtisham –ul-Haq Thanawi, *'Awratūn ki Mushkilāt ka Ṣaḥīḥ Ḥal Qur'ān wa Sunnat kay Ittibā' Hī Main Hay* (Kutub Khana Siddiqiyyah, n.d.)

[6] Although Mawlana Thanawi was the only member of the commission to disagree with the report, but the religious community and the *ulema* across Pakistan supported the opinion of Mawlana Thanawi. For the details of the background of the establishment of the commission, its sessions, the report and the dissenting note please see Tanwīr –ul-Ḥaq Thanawī, *'Ā'ilī Qawānīn Awr Ikhtilāfī Note,* (Shu'ba Taṣnīf Jami'a Eḥtishāmiya Karachī, n.d.)

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1. The husband can pronounce divorce[7] in any way, i.e. oral or written.[8] After pronouncing the divorce, if he does not revoke it, he is under obligation to give the notice of the divorce to the Chairman of Union Council and send a copy of this to the wife as well. The section does not prescribe any time limit for the notice, it only says that it should be done as soon as possible. The subsection two of the of section 7 criminalizes the contravention of the subsection (1) and prescribes a punishment of sentence up to one year and fine up to five thousand rupees or both.[9]
2. Once the husband furnishes the notice of divorce to the Chairman and supply the copy of it to the wife, the Chairman shall constitute an Arbitration Council within 30 days of the notice in order to make an attempt of reconciliation between the spouses so that the divorce could be revoked.
3. If the reconciliation attempt is unsuccessful and the husband does not revoke the divorce, it shall become effective after 90 days from the day of notice. If the wife is pregnant the divorce shall be effective at the termination of the pregnancy or 90 days whichever is longer.

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[7] The section uses the term *Ṭalāq* which is close alternative of divorce in Islamic law. There might be slight differences between divorce as an English law term and *Ṭalāq* as an Islamic law term. For instance, *Ṭalāq* is the form of the dissolution of Muslim marriage initiated and pronounced by the husband only. Divorce, on the other hand is a broader concept which can be initiated by either of the spouses. Thus, it can be said that every *Ṭalāq* is divorce but not the other way round. See, Samia Bano, *Muslim Women and Shari'ah Councils: Transcending the Boundaries of Community and Law* (Springer 2012) 40. For this paper, however, the author means with divorce as exact alternative of *Talāq* in Islamic law.

[8] This was the general rule regardless of the requirements of divorce under different school law within sharī'ah. In 2021, however, the second amendment was made to the MFLO whereby the requirement of valid pronouncement of the divorce under shī'ah law was incorporated under section clause (a), (b) (c) and subsection (1) and (1A) of section 7. Accordingly, the pronouncing divorce by a shī'ah will only be valid when it is done in the presence of two witnesses while uttering the *Ṣīghah*. This is because under Ja'farī school of Islamic law pronouncing Arabic *Ṣīghah* in the absence of two witnesses is mandatory for a valid divorce. Please see, Yūsuf al-Baḥrānī, *Al-Ḥadā'iq al-Nāḍira fī Aḥkām al-'Itrah al-Ṭāhirah* (2nd Ed Dār al-Aḍwā', 1985) Vol 25 P 245.

[9] It is interesting to note that the section does not provide the time limit for serving the notice to the Chairman but prescribes a punishment for not serving the notice. The question of the law remains there to ascertain if the husband has contravened the obligation of serving the notice without maximum time for delaying the notice.

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4. According to subsection (6) the man can marry the same woman without intervening marriage with a third person until the divorce becomes effective third time in accordance with the procedure given in section 7 of MFLO.

The procedure of divorce as provided by the above section fails in serving two core purposes. First of all, it is in contradiction with the injunctions of Islam in multiple aspects. Secondly, it does not fulfil the purpose of women empowerment. While the legislation is regarded to be one of the pro-women legislations in Pakistan, it creates a number of hardships, some of them are very serious, for the women. The two faceted flaws of the legislation are being expounded in the following sections.

4. Inconsistency with Islamic Law

The inconsistencies of the section 7 with the injunctions of Islam are multifaceted. These include, the disregard to some methods of *Ṭalāq* under Islamic law, ignoring the time of the divorce, the beginning of the *'Iddat* and the duration thereof and lastly misapplication of the issue of triple *Ṭalāq.* The details are as follows:

4.1. Disregard to All (Except One) Types of *Ṭalāq* in Islamic Law.

As the wording suggests the procedure of the divorce in MFLO presumes that all divorces are revocable.[10] Under Islamic law, with regard to the revocability, the divorce is of three types i.e. *Raj'ī, Bā'in* and *Mughallaẓ.* The *Raj'ī* is the divorce which can be revoked by the husband as long as the *'Iddat* is not expired. The *Raj'ī* divorce takes place

[10] The subsection (3) of the section 7 talks about the revocation of the divorce without mentioning the revocability of it. This means that under the section every divorce can be revoked, while it is not the case under Islamic law.

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in all cases when it is pronounced in *Ṣarīḥ* words. And *Ṣarīḥ* words are those which mean only divorce. These are precisely the words derived from the word *Ṭalāq.*[11] In such cases, if the number of divorces is not uttered or intended by the husband, only one revocable divorce will take place which the husband can revoke within the *'Iddat* period without consent of the wife.[12] *Talāq Bā'in* is the divorce which is not revocable. This divorce takes place in a number of situations which include the situation where husband expressly pronounces that the divorce is *Bā'in*, when the husband pronounced divorce in *Kināyah* words with the intention of giving divorce to the wife,[13] when the separation takes place in the result of *Khul'*[14] and when the separation takes place because of *Īlā'*.[15]

Thus, this disregard to the classification of the divorce under Islamic law with respect to the revocability of the divorce, on the one hand, makes the law of divorce short of compliance with Islamic injunctions and, on the other hand, potentially leads to the

[11] See for details, Muḥammad b. Aḥamad b. Abī Sahl al-Sarakhsī, *Al-Mabsūṭ,* (Dār al-Ma'rifah 1993) Vol. 6 P. 76.

[12] 'Alī b. Abī Bakar b. 'Abdil Jalīl al-Marghīnānī, *Al-Hidāyah,* (Dār Iḥyā' al-Turāth al-'Arabī, n.d) Vol. 2 P 254

[13] For a detailed discussion on the *kināyah* words, their classification and the impact of their usage in the context of divorce, please see 'Alā'uddīn Abū Bakar b. Mas'ūd b. Aḥmad al-Kāsānī, *Badā'I al-Ṣanā'I fī Tartīb al- Sharā'I* (Dar al-Kutub al-'Ilmiyyah, 1986) Vol. 3 P 106.

[14] *Khul'* is a contract between the spouses where the wife buys her freedom from the bond of marriage in exchange of monetary consideration which is generally the dower. See, ibid, Vol. 3 P. 152. Classically this was the case but in modern world, many Muslim states in including Pakistan, have incorporated the possibility of *judicial khul',* which is a controversial issue.

[15] *Īlā'* is a form of separation where the husband swears that he will not engage in sexual intercourse with his wife for a period of minimum four months. In that case if he, being able to engage in sexual intercourse, keeps his words and does not engage in sexual intercourse with the wife, the separation will take place and it will be counted as one *Ṭalāq Bā'in*. Please see, Muḥammad 'Alā'uddīn al-Ḥaṣkafī, *Al-Durr al-Mukhtār* (Dār al-Fikr 1992) Vol. 3 P. 422. *Īlā'* has a mention in the Qur'ān as well where the Qur'ān has prescribed the four-month as the maximum period of remaining away from the wife in *Īlā'.* In the words of the Qur'ān, if the husband does not come close to the wife after four months, it means he has firm intention of divorce. The Qur'ān says "Those who swear to abstain from their wives have four months of waiting. Therefore, if they revert back, Allah is Most-Forgiving, Very Merciful, and if they resolve to divorce, Allah is All-Hearing, All-Knowing." 2:226-227. The translation of the verses of the Qur'ān in this paper have been taken from the translation of Mufti Taqi Usmani. Please see, Mufti Muhammad Taqi Usmani, *The Meanings of the Noble Qurān with Commentary Notes,* (Maktaba Ma'ārif ul Qurān 2010).

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situation where people might live as spouses considering Pakistani law, while they are not legally married under Islam.

4.2. Ignoring the Time of Divorce

The MFLO does not make any distinction with the regard to the time of divorce from the perspective of the consummation of marriage as it makes every divorce effective after the longer one of the 90 days from the notice and expiry of the pregnancy in all cases of divorce. Under Qur'ānic injunctions, however, if a divorce is given before consummation of the marriage, it becomes effective forthwith, and there is no *'Iddat* period for such a divorce. The Qur'ān categorically says:

> "O you who believe, when you marry the believing women, and then divorce them before you have touched them, then they have no obligation of any *'iddah* (waiting period) for you that you may count. So give them due benefits, and release them in a pleasant manner."

The word "touch" in this verse of the Qur'ān refers to the privacy of the husband and wife in a situation where sexual intercourse is possible.[16] This situation is referred to as "*al-Khalwa al--Ṣaḥīḥah*" in the books of Islamic law. The *al-Khalwa al-Ṣaḥīḥah* (perfect privacy) is defined as a privacy of the married couple without any physical, psychological or legal hindrance of engaging in sexual intercourse. Thus, if a couple is in their private space but both –or any- of them is fasting, or in *Ihrām* for Hajj, or the wife is in menstruating phase, this *privacy* will not be *perfect* as there is legal hindrance in sexual

[16] Taqi Usmani, *The Meanings of the Noble Qur;ān,* Vol. 1 P. 781.

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intercourse. Likewise, if the couple is in the private space but both –or any – of them are sick, the privacy will not be perfect as there is physical hindrance. Sometime, the hindrance is psychological as well, where the spouses are in a place where there is possibility of sudden arrival or strange persons or there is a child with them in the room. The situations where either the private place is not secure or there is legal or physical hindrance, the privacy is defected which is known as *Al-Khalwah al-Fāsidah.*[17]

This disregard to the fundamental injunction of the Qur'ān, on the one had creates deficit in the law and on the other hand makes poor divorced women suffer from the needless waiting period in which they might lose a next potential match for starting a new chapter of marital life.

4.3. Beginning of *'Iddah*

The law of divorce is Pakistan specifies the day on which the husband sends the notice of divorce to the Chairman as the beginning of the *'iddah.* Thus, under the law it will begin on the day of notice and not from the date on which the husband pronounces the divorce. While under Islamic law the *'iddah* begins right from the moment of the divorce. Al-Kāsānī explains "the *'iddah* becomes obligatory from the moment of the existence of the cause of the obligation i.e. the divorce and death or any other cause. Thus, when a woman comes to know about the divorce from her husband or the death of him, she has to observe the *'iddah*

[17] The nature of privacy, with regard to its being perfect or defected, has multiple legal implications ranging from the obligation of *'iddah* and entitlement to the full dower and even in Islamic criminal law as well. For details please see Al-Sarakhsī, *alm-Mabsūṭ,* Vol. 5 P. 150.

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from the day of divorce or death according to the majority of the jurists and companions (May Allah be pleased with them[18]".[19]

This, again, on the one hand violates the dictates of sharī'ah and on the other hand can be used as a tool for victimizing women after the termination of a toxic marriage by not allowing the *'iddah* to begin and compelling women to remain within the shackles of the previous marriage.

4.4. Duration of *'Iddah*

Another issue with the law of divorce in Pakistan from the perspective of Islamic law is that the *'iddah* period provided by the section 7, MFLO is in sheer contradiction of the verses of the Qur'ān. In order to understand it, the rules about the *'iddah* in Islamic law need to be explained. Since, the issue in hand is related to the law of divorce the rules about the *'iddah* in case of the death of the husband shall be ignored here.

The *'iddah* of divorced women in Islamic law are of three types. That is the *'iddah* of the menstruation, the *'iddah* of months and the *'iddah* of pregnancy.[20] This classification is made because the period of *'iddah* varies from one woman to the other.

[18] In this article whenever the name of a companion appears, the author indents to offer the salutation of "may Allah be pleased with him/them".

[19] In this case, 'Alī b. Abī Ṭālib, one of the four rightly guided caliphs, is of the opinion that the *'iddah* will begin from the moment she has the knowledge of divorce and death. See, Al-Kāsānī, *Badā'I* Vol. 3 P. 190. This unique opinion of 'Alī should not be used as justification for the law in Pakistan because the law of Pakistan says for the beginning of the *'iddah* from the day of the notice to the Chairman. Under the law, the husband is bound to send the copy of the notice to the wife which can reach to her later than the day of the notice to the Chairman and also, in normal case, the wife has the knowledge of the divorce even before the notice to the Chairman.

[20] For the detailed discussion on the duration and applicable type of the *'iddah* in any given case of divorce –or death for that matter – please see, Al-Kāsānī, *Badā'I'* Vol. 3 P. 191-193.

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As far as the *'iddah* of menstruation is concerned, it applies to every woman that experiences menstruation and is not pregnant. The causes of this *'iddah* is the separation after a valid marriage (*al-Nikāḥ al-Ṣaḥīḥ*) whether that separation is because of divorce or any other reason. The condition for the obligation of this *'iddah* is either sexual intercourse or anything equivalent to it, which is perfect privacy. If a separation takes place after a defected marriage (*al-Nikāḥ al-Fāsid*) then only sexual intercourse makes the *'iddah* an obligation.[21] The privacy is always defected in defected marriage because the defect in marriage is a legal hurdle in sexual intercourse.

For a woman who has to observe this type of *'iddah* has to, according to the Qur'ān, undergo the waiting period of three menstrual cycles. The Qur'ān says: "Divorced women shall keep themselves waiting for three periods".[22]

As far as the *'iddah* of the months is concerned, the causes and conditions of this one are the same as the previous one. There are, however, additional condition for the applicability of this *'iddah* is that the woman does not menstruate whether due to young

[21] The marriage under Islamic law, with regard to the validity, is of three types i.e. valid or regular, invalid or irregular and void. The valid marriage is the one where all the conditions and elements of valid marriage are established. The irregular marriage is the one where some or any of the conditions are missing such as the marriage without witnesses, or the marriage without dower or the marriage in a situation where both or any of the parties are in *Iḥrām*. The void marriage is the one where there is defect in the element of the marriage such as a marriage of a Muslim girl with a non-Muslim man or the marriage with a woman of the prohibited relation or marriage with an already married woman. For details of the types of the marriage and their legal implications please see, Wahbah Zuhaylī, *Al-Fiqh al-Islāmī wa Adillatuhū,* (Dār al-Fikr, n.d) Vol. 9 P. 6550.

[22] 2: 228. The word in this verse is *Qurū'* which denotes both the period of menstruation and the period of purity i.e. *Ṭuhr.* Now, which period is meant by the word in this verse is a matter of debate between the Ḥanfī and Shāfi'ī schools. According to the Ḥanafī school the word means menstruation while the Shāfi'ī school is of the opinion that the word has been used for the period of purity. This the *'iddah* will be three menstruations under Ḥanafī school while it will be three purity periods for the Shafi'ī people. See, Zuhaylī, *Al-Fiqh al-Islāmī,* Vol. 9 P. 7174.

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age, menopause or because she naturally does not experience menstruation at all even in the age adulthood. The *'iddah* in this category is of three lunar months. The Qur'ān says:

> "And those women from among you who have despaired of (further) menstruation, if you are in doubt, their *'iddah* is three months, as well as of those who have not yet menstruated."[23]

As far as the *'iddah* of the pregnancy is concerned, that applies only to the pregnant. The *'iddah* in that case is the expiry of the pregnancy. This can happen right after divorce or it can take 9 months or even more. The Qur'ān says. "As of those having pregnancy, their term is that they give birth to their child".[24]

This details shows that, under Islamic law, there is a small possibility of counting *'iddah* as 90 days, which is when a woman, who neither menstruates no she is pregnant, is divorced in the middle of the lunar moth.[25] In the case of the *'iddah* by menstruation, the *'iddah* can expire way early than 90 days.[26] And in the case of pregnancy, as it has been explained, the expiry of *'iddah* can take place between one day to 9 months and beyond. Thus, devising the single criteria of 90 days as the expiry of *'iddah* amounts to compelling

[23] 65:4. Since the lunar calendar is applied in Islam, the months are here the lunar months. The jurists are of the opinion that is the divorce happens to be in the first day of the lunar month, the *'iddah* will be three lunar months, even if the days of all –or any – of the months are less than 30. But if the divorce is pronounced in the middle of the month, then every month will be of 30 days. Please see, 'Uthmān b. 'Alī Fakhruddīn al-Zayla'ī, *Tabyīn al-Ḥaqā'iq Sharḥ Kanz al-Daqā'iq* (Al-Maṭba'ah Al-Amīriyyah, 1313AH) Vol. 2 P. 192.

[24] 65:4.

[25] Even in that case, one opinion of Abū Yūsuf suggests that she shall count the first month as 30 days and remaining months according to the moon sighting. See, Al-Kasānī, *Badā'I'* Vol. 3 P. 196.

[26] According to the opinion of Abū Yūsuf, considering the minimum possible days of menstruation and minimum possible duration of purity, an *'iddah* of the divorced woman can expire as early as 39 days. This is because the minimum possible duration of menstruation and purity, under Ḥanafī law, is three days and fifteen days respectively. This if a woman start menstruation right after divorce and reaches purity after three days and next menstruation and purity are also in minimum days, the *'iddah* will be completed in 39 days. Please see, Muḥammad b. Aḥmad b. Abī Aḥmad Al-Samarqandī, *Tuḥfah al-Fuqahā'* (Dār al-Kutub al-'Ilmiyyah 1994) Vol. 2 P. 253.

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a woman to remain within the bond of an already expired marriage and lose next suitable match.

4.5. Misapplication of the Issue of Triple Ṭalāq

The section 7 of MFLO wrongly applies the contentious triple *Ṭalāq.* Before delving to the analysis of the section the issue of triple *Ṭalāq* should be explained. In order to make the picture clear, the following explains the issue of multiple divorces in one go.

Under Islamic law, the divorce, with regard to number and timing of pronunciation, is classified into three types i.e. the *Ṭalāq Aḥsan, the Ṭalāq Ḥasan* and the *Ṭalāq Bid'ī.*[27] The details are as follows:

1. The *Ṭalāq Aḥsan* is the one in which the husband pronounces one divorce during the period of purity in which he did not engage in sexual intercourse, and leaves it unrevoked until the expiry of the *'iddah*. The divorce is called *Ṭalāq Aḥsan* i.e. the best divorce because it, on the one hand, leaves the door of revocation open during the *'iddah* and re-marriage with the same wife even after the *'iddah* without intervening marriage with a third person.[28]
2. The *Ṭalāq Ḥasan* i.e. better divorce is the one in which a husband pronounces the one divorce in the period of purity in which he did not engage in sexual intercourse with the wife followed by next two single divorces in following two periods of purity without revoking the divorces. This divorce is known as Ḥasan because in

[27] For the details of the classification and the reason why a particular terminology has been assigned to the type of divorce concerned, please see Muḥammad b. Faramurz b. 'Alī Mullā Khisro, *Durar al-Ḥikām Sharḥ Ghurar al-Aḥkām* (Dār Iḥyā' al-Kutub al-'Arabiyyah n.d) Vol. 1 P. 359

[28] Ibid.

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this the husband has the option of reverting back the marriage before expiry of the *'iddah*. However, once the *'iddah* is over there is no room for re-marriage with the same wife without intervening marriage with a third person. The Muslim jurists consider the *Ṭalāq Aḥsan* and the *Ṭalāq Ḥasan* is two sub-classes of *Ṭalā al-Sunnah.*[29]

3. The *Ṭalāq Bid'ī*[30] i.e. the innovative divorce is the one which becomes *Bid'ī* because of two factors i.e. the timing of the divorce and the number of the divorce. The details are as follows:
    a. The divorce becomes contrary to the Sunnah when the timing of the divorce is wrong e.g. the divorce is pronounced either during the period of menstruation or it has been pronounced in the period of purity in which the husband engaged in sexual intercourse with the wife.
    b. As far as the second factor is concerned where the divorce becomes innovative because of its number, is when the husband pronounces more than one divorce in one sitting i.e. *majlis*.[31]

The Muslim jurists unanimously agree that pronouncing more than one divorce in one sitting is incorrect as the better and appropriate way of divorce is to pronounce one divorce in one period of purity. But the jurists differ on the issue whether such multiple divorces in one sitting are effective or not. The four *Sunnī* schools i.e. Ḥanafī, Mālikī,

[29] ibid

[30] The Bid'ī is derived from *Bid'ah* which denotes anything which is innovated in sharī'ah not having any basis. Please see, Ibrāhīm b. Mūsā b. Muḥammad al-Shāṭibī, *Al-I 'tiṣām* (Dār Ibn-e-'Affān 1992) Vol. 1 P. 49. Committing any act of *Bid'ah* is sin according to Muslim theology. The *Bid'ī* divorce is not called *Bid'ī* is at is baseless, thus it should be invalid. Instead, it is called so because it is not consistent with the *Sunnah* guidelines of divorce. Please see, Mullā Khisro, *Durar al-Ḥikām* Vol. 1 P. 359

[31] The text of fiqh manuals suggest that one *Majlis* (or one sitting) means the whole duration of purity if the husband does not revoke the first divorce and pronounces the next. Please see, ibid.

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Shafi'ī and Ḥanbalī schools hold that although pronouncing multiple divorces in one sitting is incorrect method of divorce, but the divorces will be effective. The Ẓāhirī school, however, holds that multiples divorces in one sitting shall be counted as one divorce. In modern days, the Salafī school which mainly follows that ideas of Ibn-e-Taymiyyah is flag bearer of the opinion that multiple divorces in one sitting shall be counted as one divorce.[32]

Since the issue of triple *Ṭalāq* is not the primary focus of this study, the detailed arguments of majority of the jurists and Salafī school shall be ignored here. Instead, after explaining the issue, it is now appropriate to come back to the primary issue and that is the misapplication of the triple *Ṭalāq* in Pakistan's law of divorce. The sub-section (6) of the section 7 of MFLO provides that the divorced husband and wife can re-marry without intervening marriage with a third party. The intention of this sub-section was probably to adapt the opinion of Ibn-e-Taymiyyah in the issue like many Muslim countries have done so,[33] but the section posited it a way that it does not comply with the opinion of any schools of Islamic law. For instance, if a husband pronounces one divorce in the beginning of period of purity without engaging in sexual intercourse, then he pronounces the second in the next purity and third in the third period of purity and afterwards he sends the notice of the divorce to the Chairman. In this case, according to all the schools of Islamic law, three divorces take place but according to the section 7 of MFLO only one divorce shall be effective and the man and the woman can re-marry without intervening marriage with a third person.

[32] For details of the issue of triple *Ṭalāq* please see Muḥammad Siddīq Ḥasan Khān, *Al-Durar al-Bahiyyah wa al-Rawḍah al-Nadiyyah wa al-Ta'līqāt al-Raḍiyyah* (Dār Ibn al-Qayyim 2003) Vol.2 P. 250-255.

[33] For details about the incorporation of the issue of triple *Ṭalāq* in Muslim states please see, Zuhaylī, *al-Fiqh al-Islamī,* Vol. 9 P. 6928.

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To sum up the discussion, it can safely be asserted that the section 7 of MFLO, particularly the subsection 3, 5 and 6 thereof are inconsistent with the injunctions of Islam in multiple aspects. Not only that the section is in contradiction with the injunctions of Islam, the section, as it shall be discussed later, creates severe hardships for women after the termination of a toxic marriage.

5. The Court Ruling and Recommendation by CII

Pakistan is, by constitution, an Islamic Republic[34] where, under the article 227 of the Constitution, all laws are to be brought in conformity with the injunctions of Islam as laid down in the Qur'ān and the Sunnah and the same article prohibits incorporating laws inconsistent with the said injunctions. This article sets the foundation but the question about any specific law whether or not that is consistent with these injunctions would have remained unresolved had the Constitution not devised a scheme thereof. The Constitution of Pakistan, for the purpose of fulfilling the obligation set out in Article 227 of the Constitution, established two institutions i.e. the Federal Shariat Court (FSC) and the Council of Islamic Ideology (CII). The former has jurisdiction to rule on the repugnancy of any law and its ruling is binding in a way that when the decision of the Court attains finality it binds even the Supreme Court of Pakistan[35] and any law declared inconsistent with the injunctions of Islam become void to the extent of repugnancy. The later body gives

[34] The Article 2 of the Constitution of Pakistan declares Islam as the state religion of Pakistan. The role of Islam has been established in more than obvious terms in the Objectives Resolution, which was, earlier, the preamble of the Constitution and, later, made an operative and substantive part of the Constitution by Article 2A of the Constitution.

[35] *Zaheer –ud-Din V. The State* PLD, 1993, SCMR 1718

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recommendations to the law makers in order to bring the laws in conformity with the injunctions of Islam.

Thus, there is the need to look upon the FSC and CII to see how these institutions consider the law of divorce in Pakistan. This is important because, legally and constitutionally, only the opinion of CII and ruling of FSC in the eyes of the constitution of Pakistan.

5.1. Court Ruling

The FSC has evaluated multiple sections of MFLO in general and section 7 thereof in particular on the touchstone of the Injunctions of Islam in 2000 judgement of *Allah Rakha* case[36] where the FSC coupled 37 different shariat petitions filed in the court challenging the validity of multiple sections i.e. section 4,[37] 5,[38] 6[39] and 7 of the MFLO from the touchstone of the injunctions of Islam. Leaving the ruling of the court on the section 4, 5 and 6 aside, its decision on the section 7 is of significance for this study.

The court after a thorough perusal of the arguments and sources of Islamic law, on the one hand acknowledged the need of regulating divorce and making arrangements for keeping record of the divorces for better life of women and on the other hand declared the

[36] *Allah Rakha and Others V. Federation of Pakistan and Others* PLD 2000 FSC 1

[37] The section 4, MFLO deals with the issue of the inheritance share of the orphaned grandchild in the estate of his grandparent. According to the section 4 an orphaned grandchild shall be given the share in the estate of the grandparent which his father or mother would have been given if he or she were alive.

[38] The section 5, MFLO deals with the registration of marriage. According to the section registration of Muslim marriage is obligatory and contravening to this obligation is punishable offence.

[39] The section 6, MFLO deals with polygamy. According to this section a Muslim is not allowed to enter into a marriage contract with additional wife without written permission from the Arbitration Council and the marriage without such permission shall not be registered. The person doing so, on the one had shall be liable to pay full dower for the previous wife and he may be punished with imprisonment on the conviction upon complain. Further, under section 2 (iia) of the Dissolution of Muslim Marriages Act, 1939 such a marriage will be valid ground for the first wife to dissolve her marriage with the husband.

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sub-section 3 and 5 of the section 7 of MFLO. The court declared that the *'iddah* for women shall be different considering the condition of the woman concerned and the *'iddah* shall begin right after divorce and not from the day of the notice to the Chairman. The court directed that the President of Pakistan shall take steps to amend the law failing which the law shall cease to have effect from 31st March 2000.

5.2. Recommendation of CII

The CII has considered the MFLO multiple times. The recommendation of the CII regarding MFLO published in the Annual Report of the Council in 2013-14 is of great significance as this report makes the analysis of the whole of MFLO. The recommendation of the CII particularly related to the law of divorce from the said report makes it clear that the law of divorce in Pakistan has multiple contradictions with the injunctions of Islam. The summary of the recommendation of the CII is as follows:

- The Family Law of Pakistan seeks to revive the pre-Islamic custom that stands in direct contradiction to the Qur'an, because it prohibits the contracting of a new marriage until three divorces have become effective in accordance with the procedure prescribed by the law. It is, however, absolutely clear that according to the Qur'an and Sunnah, every divorce becomes effective immediately upon its pronouncement, whether by word of mouth or in writing. The imposition, by this law, of a ninety-day conditional period for the effectiveness of divorce constitutes a clear distortion of, and open contradiction with, the injunctions of the Qur'an and *Sunnah*.

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- The Qur'ān, the *Sunnah*, the consensus of the Muslim jurists, and the continuous practice of the *Ummah* from the time of the Prophet until today, all unequivocally establish that once the husband pronounces divorce, whether orally or in writing, it becomes effective immediately. The dissolution of marriage and the commencement of the *ʿiddah* take effect from that very moment. Hence, to make the effectiveness of divorce dependent upon its notification, registration, or approval by any authority other than the husband himself is in express contradiction with the *Sharīʿah* injunctions. Moreover, sub-section (1) is also objectionable in this respect, as it criminalizes the husband for failing to make an official declaration of divorce or for not sending written notice thereof, and considers him liable to punishment.
- This provision is wholly contrary to the Qur'ān, the *Sunnah*, and the consensus of the *Ummah*. According to this law, no form of divorce—whether express (*ṣarīḥ*) or implied (*kināyah*), before or after consummation of marriage, *bā'in* or *mughallaẓ*—is deemed effective before the expiry of ninety days. The period of divorce begins only after the Arbitration Council has failed in its reconciliation efforts and the notice has been received by the Chairman. In contrast, under the *Sharīʿah*, divorce takes effect immediately upon its utterance. These provisions further imply that in every kind of divorce the husband retains the right of *rujūʿ* (revocation), except in the case of a pregnant woman, whereas according to the Qur'an, the husband's right of *rujūʿ* is limited to two divorces only. The law also suggests that in every type of divorce, the Chairman of the Arbitration Council may attempt reconciliation, whereas under Islamic law such authority does not exist

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Based on the research done by the research wing of the council, opinion of the members of the council and thorough discussion in the meeting of the council the council proposed the following changes to the laws of divorce in Pakistan:

1. If the divorce is *Rajʿī* according to the school of the wife, the husband may revoke the divorce during the period of *ʿiddah*.
2. If the divorce is *Bāʾin* according to the wife's school of law, the husband cannot revoke the divorce during *ʿiddah*.
3. No person shall pronounce more than one divorce in a single period of purity.
4. Whoever, in contravention of sub-section (3), pronounces more than one divorce — whether orally or in writing — according to his school of law, or prepares a divorce deed containing more than one pronouncement of divorce for another person, shall be punished with simple imprisonment for a term not exceeding one year, or with corporal punishment not exceeding twenty lashes.
5. For a divorced woman whose divorce has become *mughallaẓ* (i.e. all the three divorces have taken place) according to her school of law, any remarriage with her former husband shall be void unless all the requirements of *Shariʿah* for such remarriage have been duly fulfilled.
6. The period of *ʿiddah* shall be calculated as follows:
    a. A non-pregnant woman who menstruates shall observe *ʿiddah* for three menstrual cycles after divorce; however, if she belongs to the *Jaʿfarī* school, her *ʿiddah* shall consist of three periods of purity.
    b. For a girl or woman who does not menstruate, the period of *ʿiddah* shall be three lunar months.

c. For a pregnant woman, the period of *ʿiddah* shall continue until termination of pregnancy.[40]

6. Protection or Constraints of Women Rights

Not only the law of divorce in Pakistan is inconsistent with the injunctions of Islam, it also fails to meet the purpose of making a pro-women legislation. The law was intended with to protect the rights of women, it turned out to be one of the most distressful laws for women. In one way, it revives the pre-Islamic victimizing tactics of cruel men and in the other way it has the potential to make the next marriage of the divorced women a criminal offence. The following explains it.

It was an old Arab custom that men used to pronounce divorce to the wives and then revoke the divorce before expiry of the *'iddah* and then again divorce them. In this way they would keep the women in hanging position –neither in marriage nor out of it – by repeatedly divorcing them and revoking the divorce.[41] The underlying logic behind this practice was that the husbands were considered to be in ownership of their wives like any other property.[42] In order to curb this cruelty and establish the notion that women own their agency, the Qur'ān limited the number of divorces to three after which revocation from the divorce were made not possible without intervening marriage with a third person and termination thereof after consummation. Even then, the next marriage with the same husband depends on the free will and consent of the wife. The Qur'ān says "Divorce is

[40] Please see, CII, *Annual Report 2013-14* (CII 2016) p. 181.

[41] Muḥammad b. Jarīr b. Yazīd Al-Ṭabarī, *Jami' al-Bayān fī Ta'wīl al-Qur'ān* (Mu'assasah al-Risālah 2000) Vol. 2 P. 36.

[42] Hadf News, 'المرأة في العصر الجاهلي... الوجوه الخفية والأدوار المتناقضة' (3 Sep 2017) https://hadfnews.ps/post/32521/المرأة-في-العصر-الجاهلي-الوجوه-الخفية-والأدوار-المتناقضة accessed [26 October, 2025]

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twice; then either to retain in all fairness, or to release nicely".[43] The background of the revelation of this verse has been reported as once a husband took swear to his wife that he would neither retain her as wife nor would he let her marry someone else. When the wife asked him how would he be able to do that, he answered that he would pronounce the divorce and revoke it and the follow the practice for indefinite time. The woman's complaint reached to the Prophet and Allah Almighty sent the revelation of this verse.[44] The men were commanded either to retain women with full fairness or release them in the nicest manner so that the misery of women would reach to a final end.[45]

The section 7 MFLO, although unintentionally, exactly revives the same practice by allowing husband to revoke divorces after pronouncing it. This is because until and unless the notice of the divorce is not given to the Chairman of the Council, the divorce can be revoked. Even after the notice, the divorce can be annulled by a successful attempt of reconciliation.

The second issue with the procedure of divorce is the requirement of the notice and beginning of the *'iddah* on the notice. This provision allows husband to compel the wife to live in a miserable condition. The law prescribes that notice of the divorce has to be given to the Chairman but it neither specifies the time limit for giving the notice and nor it provides the result of the failure to giving the notice by the husband. Adding salt to wound the courts in Pakistan made an interpretation of the section in a way the divorced wife and her second husband faced the charges of adultery and conviction.

[43] 2:229
[44] Abū 'Abdillah al-Ḥākim Muḥammad b. 'Abdillah al-Nisābūrī, *Al-Mustadrak* (Dār al-Kutub al-'Ilmiyyah 1990) Vol. 2 P. 307 Hadīth No. 3106.
[45] Taqī Usmānī, *The Meanings of the Noble Qur'ān* Vol. 1 P. 72.

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The development of the disturbing jurisprudence began in 1963 with *Ali Nawaz Gardezi* case.[46] The facts of the case are quite interesting having a potential movie plot revolving around a love triangle spiced with court room drama. Ali Nawaz Gardezi, a Pakistani Shia Muslim, married to a German lady Christa Renate Sontagg in Hull England and later they settled in Lahore Pakistan. The couple befriended with Lieutenant Col. Muhammad Yusuf, who was martial law administrator in Quetta. Soon, the lady and the man in uniform developed the feelings of love and affection towards each other. Allegedly, Gardezi divorced the German lady and she married Col. Yusuf and converted to Islam and adopted the Muslim name of Ruqayya. Gardezi filed a complaint against Col. Yusuf under section 497[47] and 498[48] of Pakistan Penal Code.[49] Gardezi contended that his marriage with Christa was still intact and consequently her marriage with Col. Yusuf is void and as result their cohabitation was adultery. The West Pakistan High Court convicted Col. Yusuf for adultery and when the matter came to the Supreme Court it upheld that not giving the notice to the Chairman after divorce meant that the husband probably revoked it. In later judgements the Courts in Pakistan relied so much upon this observation of the Supreme Court that it became a celebrated precedent known as *the Gardezi Rule.*[50] Some of the cases

[46] *Ali Nawaz Gardezi V. Colonel Muhammad Yusuf* PLD 1963 SC 51.

[47] Section 497, Pakistan Penal Code was about adultery according to which if a man committed sexual intercourse with the wife of another person and that intercourse was not rape, he would have been punished with sentence of imprisonment up to 5 years and fine. The section 497 was repealed from Pakistan Penal Code after promulgation of the *Zina Ordinance* in 1979.

[48] The section 498 of PPC was about enticing the wife of another person or taking her away with the intention that she would live with him and have illicit relations. A man guilty of such an offence was liable to the sentence of imprisonment for a term up to two years and fine. Like the previous section, this section was repealed from PPC by promulgation of the *Zina Ordinance* in 1979.

[49] Among the three countries i.e. India, Pakistan and Bangladesh that inherited the Penal Law from the British colonial masters as the Penal Code of 1860, only Bangladesh has the law related to adultery and enticing wife of other man. The two sections of Indian Penal Code have been declared unconstitutional in India by the Indian Supreme Court in *Joseph Shine V. Union of India* AIR 2018 SC 4898

[50] See, Muhammad Munir, 'Reforms in triple talaq in the personal laws of Muslim states and the Pakistani legal system: Continuity versus change' (2013) 2 (1) *International Review of Law* 1-12.

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where the *Gardezi rule* was applied by the courts in Pakistan include *Mst. Tauqir Fatima,*[51] *Abdul Aziz,*[52] *Abdul Manan,*[53] *Mst. Ghulam Fatima*[54] *Muhammad Salahuddin Khan*[55] and *Junaid Ali*.[56] The situation got even worse when courts started convicting persons for *Zina* after the promulgation of the *Hudood Ordinance* during General Zia regime. Here, however, the FSC provided an escape for the by holding that not giving notice to the Chairman does not make the divorce revoked but it makes the divorce ineffective but for the purposes of the *Zina Ordinance* the second marriage will be regarded as valid.[57]

Leaving few exceptional cases aside, the repeated judgements of the courts in Pakistan applying the *Gardezi rule* provided a safe room for the cruel men to prosecute women and their next husbands for *Zina* by pronouncing divorce and not giving the notice to the Chairman.[58]

There had been few exceptional cases where the courts did not apply the *Gardezi rule* like *Kaneez Fatima*[59] but later the Supreme Court of Pakistan took a U-turn once again and held the same position as *Gardezi* case in *Farah Naz.*[60] This jurisprudence, on the one hand, equips the men with the weapon of victimization women and on the other hand leaves women with the option of either remain in the hanging position for indefinite time

[51] *The State V. Mst. Tauqir Fatima* PLD 1964 (W.P) Karachi 306.
[52] *Abdul Aziz V. Razia Khatoon* DLR 1969, 733
[53] *Abdul Manan V. Safrun Nesa* 1970 SCMR 845
[54] *Mst. Ghulam Fatima V. Abdul Qayyum and Others* PLD 1981 SC 460
[55] *Muhammad Salahuddin Khan V. Muhammad Nazir Siddiqui* 1984 SCMR 583
[56] *Junaid Ali v. Abdul Qadir* 1987 SCMR 518
[57] *Noor Khan V. Haq Nawaz* PLD 1982 FSC 265.
[58] The requirement of giving notice of effectiveness of the divorce would help women in certain situations where the women claim for the maintenance for the period between pronouncement of the divorce and serving the notice thereof to the Chairman. In these cases, the husbands have the option of giving the notice right away and get released of the obligation of maintenance. But the misery of the women suffering from the victimizing tactic of the cruel minded men is way bigger than the small monetary benefits of few women.
[59] *Kaneez Fatima V. Wali Muhammad* PLD 1993 SC 901
[60] *Farah Naz V. Judge Family Court* PLD 2006 SC 457

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or file for *Khul'* and compromise on all of the financial rights that would have been available for them should the marriage was ended in accordance with the laws of divorce provided by the injunctions of Islam.

7. Conclusion and Recommendations

What have been explained and discussed above, leads us to the conclusion that the law of divorce in Pakistan is flawed in multiple aspects. On the one hand it has numerous inconsistencies with the injunctions of the Islam as laid down in the Qur'ān and the *Sunnah*. The Council of Islamic Ideology has acknowledged the need of the law of divorce but declared the law un-Islamic and proposed suitable amendments. The FSC declared the sub-section (3) and (5) of the section 7, MFLO as being repugnant to the injunctions of Islam. Not only the law falls short of compliance with the Islamic injunctions, it also fails to serve the protection of the legitimate rights of the women. Instead it creates severe hardships for the divorced women. There for the law needs to be amended to bring it in conformity with the injunctions of Islam and make it pro-women law.

In order to make it a legal reality, the following are the recommendations

1. It should be prohibited for a man to pronounce more than one divorce in one sitting. Pronouncement of more than one divorce in one sitting or pronouncement of divorce during menstruation should be valid for the ones whose school of law allows it, but the man should be punished.
2. The lawyers and stamp sellers should be educated not to write more than one divorce in the divorce deeds.

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3. It should be obligatory for the man to inform the Union Council about the divorce, failing which he should be given a mild punishment of simple imprisonment and fine, but the effectiveness of the divorce should not be dependent on the notice to the Union Council. In such case the Union Council shall make an attempt of reconciliation in all divorces except in case when three divorces have become effective.
4. The *'Iddah* of the divorced woman shall begin right after the divorce and the *'iddah* period shall be prescribed keeping the teachings of the *Qur'ān* in mind.
5. It should be made mandatory, in case of revocable divorce, that the wife and the husband shall live together for the period of *'iddah*, particularly the woman shall not be expelled from the house of the husband without her free will.